BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MERCEDES SECENA	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 259,658
NATIONAL BEEF PACKING COMPANY	)	& 267,354
Respondent	)	
AND	)	
	)	
CONNECTICUT INDEMNITY COMPANY/ROYAL & SUN ALLIANCE/EBI; COMMERCIAL UNION INSURANCE COMPANY, a/k/a CGU HAWKEYE SECURITY; and LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier CGU Hawkeye Security appeal the December 3, 2003 Award of Administrative Law Judge Pamela J. Fuller. The Appeals Board (Board) held oral argument on May 25, 2004.

APPEARANCES

Claimant appeared by her attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier Connecticut Indemnity Company/Royal & Sun Alliance/EBI (Royal) appeared by their attorney, Shirla R. McQueen of Liberal, Kansas. Respondent and its insurance carrier Commercial Union Insurance Company, a/k/a CGU Hawkeye Security (CGU) appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company (Liberty) appeared by their attorney, Terrence J. Malone of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). In addition, the parties acknowledge that the November 13, 2003 deposition of Selena Sena, while not listed in the Award of the

ALJ, is part of the record and will be considered by the Board for the purposes of this litigation.

Additionally, the ALJ noted in the Award that, while some temporary total disability compensation was paid, no information as to the amount or the period for which it was provided was included in the record. Respondent and its insurance carrier CGU, in its January 26, 2004 brief to the Board, advised that claimant was paid 10.92 weeks of temporary total disability compensation at the rate of $305.84 per week for a total of $3,340.55. The parties stipulated at oral argument before the Board that inclusion of this information in the record was appropriate for the purposes of computing this award.

ISSUES

(1) On what date or dates did claimant meet with personal injury by accident arising out of and in the course of her employment? After reading the briefs and considering the oral argument, it is apparent to the Board that, rather than disputing whether claimant suffered personal injury by accident, the actual dispute is centered on which date claimant suffered injuries that resulted in permanent impairment and to which date should the award attach any permanent partial general disability which may be appropriate.

(2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent on June 1, 2000, as a laborer. On July 24, 2000, while returning from sharpening her knife, claimant slipped and fell on a greasy, watery area. She was unconscious and had to be taken to the emergency room. Her injuries included her back, her head, her right hip, her arms and her hands. Selena Sena, respondent's workers' compensation coordinator, testified that claimant's job on July 24, 2000, was that of a lean upgrade trimmer.

Claimant was taken to the emergency room at the Southwest Medical Center, where she ultimately came under the care of J. E. Harrington, D.O. Dr. Harrington treated claimant for her back, head and right hip, and later treated her for her hands and arms. Dr. Harrington suggested that claimant undergo surgery on her hands and arms, but claimant refused the surgery.

Claimant was then referred to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation, with the first examination on October 24, 2000. Dr. Murati

diagnosed contusions on claimant's back, left side and right hip, from the fall. He treated her conservatively through November 28, 2000, at which time he diagnosed a resolved lumbosacral strain, returning her to work without restrictions.

At the request of her attorney, claimant was examined by board certified orthopedic surgeon C. Reiff Brown, M.D., on March 7, 2001. Claimant described a slip and fall where she was not rendered unconscious, but was dazed. She described pain in the entire left side of her body at the time of the incident. Claimant advised Dr. Brown she continued to have symptoms in her back and left wrist, but that she was not having any difficulties with her right wrist at that time. Dr. Brown diagnosed carpal tunnel syndrome, with some activity in the cervical and lumbar areas, although he was unable to find specific neurological problems or objective indications of any ongoing pathology. He recommended ongoing physical therapy and possible repeat EMG nerve conduction studies. His treatment regimen was one he described as being rather conservative. He opined that after undergoing treatment, he would probably place claimant in a DRE Category II. However, after being provided an MRI which was performed on April 17, 2001, he found claimant's MRI studies to be consistent with degenerative changes throughout her lumbar spine. He did note that if claimant was asymptomatic prior to the fall, the fall would have possibly made her symptomatic. He assumed the July 2000 fall was the aggravating factor, but also acknowledged he was provided no medical records pertaining to the March 10, 2001 incident.

Claimant was seen by Marc-Andre Bergeron, M.D., board certified in orthopedic surgery, with the first examination on March 12, 2001, after claimant alleged a second injury on March 10, 2001. Claimant described this incident as occurring while she was pulling a tub of meat. Claimant stated she could not pull the tub and her body locked up and she was unable to continue working. She was again taken to the emergency room, where she ultimately came under Dr. Bergeron's treatment.

Between the incidents in July 2000 and March 2001, claimant was returned to work with respondent, performing several light- and regular-duty jobs. Those jobs are listed in Respondent's Deposition Exhibit 1, attached to the November 13, 2003 deposition of Ms. Sena.

Claimant testified that after being returned to work, she was returned "on the knives again" or "to the knives."[1] Claimant went on to state that the knives job was the job she was working on before her injury, which Ms. Sena had identified as lean upgrade trimmer.

Claimant again came under the care of Dr. Murati, who treated her and released her on December 11, 2001, with a 5 percent whole person impairment based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

---

[1] R.H. Trans. (Feb. 14, 2003) at 26 & 30 (Docket No. 259,658).

Dr. Murati reviewed the fifteen tasks contained in vocational expert Jerry Hardin's task list, finding claimant unable to perform eight of the fifteen tasks. The ALJ, in the Award, determined that five of the tasks, involving vacuuming floors and cleaning, were duplicative and, therefore, should be combined to only two tasks. Thus, he ultimately concluded that claimant was unable to perform seven of twelve tasks, for a 59 [*sic*] percent task loss.

There was significant dispute during oral argument and in the briefs regarding claimant's credibility due to the fact she failed to advise Mr. Hardin when she first met with him of approximately ten years of employment in California. This involved cleaning jobs with Service Master and Family Home. However, claimant did recontact Mr. Hardin after the regular hearing, providing him with the additional information. Those additional job tasks were listed in his final report and discussed at the time of his deposition. While this fact does ultimately affect the weight of claimant's testimony, as her credibility is somewhat damaged, nevertheless, the Board finds that from this record, it appears claimant's task performing history is, at this time, complete.

Claimant continued performing jobs, both accommodated and regular duty, through January 4, 2002, which was her last day of work with respondent. At that time, respondent determined it could no longer accommodate claimant's restrictions, and she was placed on leave of absence. Claimant testified that she has been looking for work since that time. During the regular hearing, claimant advised the ALJ that she was applying at an average of one location every day. She also promised the ALJ she would provide her a list of those job applications. However, no such list was ever provided, and the ALJ determined that claimant had failed to prove that she was putting forth a good faith effort to find employment. The ALJ then imputed a wage based upon the wage earning ability opinion of Mr. Hardin, that claimant could earn $220 per week. This results in a 52 percent wage loss. It is noted that claimant did not dispute this wage loss opinion in either her brief or her oral argument to the Board. The Board, therefore, adopts the ALJ's finding that claimant suffered a 52 percent wage loss for the purposes of this Award.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[2]

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

---

[2] *See* K.S.A. 44-501 and K.S.A. 44-508(g).

[3] K.S.A. 44-508(g).

any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[4]

Date of accident has long been a thorn in the side of workers' compensation litigants in Kansas. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the date of accident being a legal fiction, rather than a specific traumatic event. In this instance, claimant suffered two specific traumatic events, with the dispute centering around whether claimant's permanent impairment and any disability she may be entitled to are from the first injury on July 24, 2000, or the second injury on March 10, 2001.

As the ALJ noted, Dr. Murati was the only doctor who evaluated and treated claimant after both accidents, as well as performing a third evaluation on May 21, 2002. This does provide Dr. Murati with the opportunity to determine not only claimant's impairment, but also the specific incident associated with the development of that impairment. Dr. Murati assessed claimant a 5 percent whole person impairment pursuant to the AMA *Guides* (4th ed.) in his December 11, 2001 report. The Board adopts that finding as its own for the purposes of this Award. It is significant that Dr. Murati returned claimant to work on November 28, 2000, after her first injury, with a resolved lumbosacral strain, no permanent restrictions and no permanent impairment. Claimant's functional impairment and restrictions did not arise until after the March 2001 incident. While it is noted Dr. Murati's information was not totally complete, as he was not provided certain medical records, including Dr. Brown's March 7, 2001 report, indicating claimant needed additional treatment, Dr. Murati, nevertheless, had the opportunity to examine claimant on multiple occasions over a lengthy period of time. His determination that claimant's impairment and limitations occurred as a result of the March 2001 injury is the most credible opinion in the record, and the Board finds that the ALJ's finding that the permanent restrictions and permanent limitations placed upon claimant stem from that injury, is appropriate and is affirmed.

K.S.A. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

---

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

As noted above, the Board has already determined that claimant has suffered a wage loss of 52 percent. However, the statute requires a determination regarding both the wage loss and the task loss. Respondent argues the deposition testimony of physical medicine and rehabilitation specialist Philip R. Mills, M.D., that claimant has no work disability in this matter is most credible. Dr. Mills found claimant to have complaints which were not explainable on a physiological basis, but also acknowledged degenerative changes in her MRI. He also agreed he was not convinced whether claimant's symptom magnification was intentional or some type of hysterical pattern of which claimant would not have been aware. Dr. Mills was unable to say whether claimant's component of deception was conscious or not. Additionally, certain tests, which were available to other doctors, including the EMGs, were not available for Dr. Mills to review. The Board does not find Dr. Mills' testimony in this regard convincing. Therefore, Dr. Mills' opinion that claimant has no limitations as a result of the alleged injuries is rejected.

Likewise, the Board rejects the opinion of C. Reiff Brown, M.D., who places the entire liability for this claim on the July 2000 accident. The fact that Dr. Brown only examined claimant on one occasion, three days "prior" (emphasis added) to the second injury, renders his opinion speculative, at best.

The only opinion in the record dealing with what, if any, task loss claimant may have suffered is that of Dr. Murati. Dr. Murati found, of the fifteen tasks listed by Mr. Hardin, claimant was unable to perform eight. The ALJ combined two tasks from two different jobs, both of which were described as "vacuumed floors." The Board acknowledges from the descriptions of those jobs, they appear to be incredibly similar, if not identical. Therefore, the ALJ's combination of those to reduce the task list to fourteen from fifteen, is affirmed.

The ALJ went on, however, to combine three tasks which are described as (1) cleaned home, (2) cleaned restrooms and (3) cleaned offices, as one task. The Board does not find that cleaning a restaurant necessarily involves the same tasks as cleaning a home. Likewise, cleaning a home could have tasks significantly dissimilar to that of cleaning an office. The Board finds that those tasks, while perhaps similar, are not identical and will not be combined for the purposes of this Award. The Board finds the list provided by Mr. Hardin, as reviewed by Dr. Murati, contains fourteen nonduplicate tasks. Additionally, two tasks listed with respondent National Beef require additional scrutiny. Task No. 5 is identified as "sharpened knives." However, the job list provided by Ms. Sena does not contain a job described as "sharpened knives." Claimant nowhere testifies to working a job in which she exclusively sharpened her knife. The only mention of sharpening knives is claimant's regular hearing testimony that she was returning from sharpening her knife when she slipped and fell on a greasy, wet area. This would indicate that the activity of sharpening knives, while not a regular job, was an occasional activity utilized by claimant in order to keep her knives sharp for the purpose of performing the other jobs to which she was assigned. This is not an activity which would be considered repetitive, even though the task performance assessment from Mr. Hardin lists it as a

repetitive activity. Were claimant assigned a specific job where she sharpened knives on a regular basis, the Board would agree that it would be a repetitive activity. However, under these circumstances, that conclusion cannot be reached. Therefore, the Board finds the indication that claimant is unable to perform that activity to be incorrect based upon this record.

Additionally, task No. 6, from the National Beef list provided by Mr. Hardin, indicates that claimant's safety gear weighed anywhere from one to sixty pounds. It was indicated that claimant was unable to perform that task, as it exceeded the weight limitations provided by claimant's doctors. However, Ms. Sena weighed the safety gear, finding that it, instead, weighed 9.4 pounds, which does not exceed the weight limitations placed upon claimant by any of the doctors. Therefore, the rejection of that task is also contraindicated based upon this record, and the Board finds claimant had the ability to perform that task as well. Based upon a review of this record, the Board finds claimant unable to perform five of the fourteen tasks listed in Mr. Hardin's report. Claimant has, therefore, suffered a 36 percent loss of tasks.

K.S.A. 44-510e mandates that the task loss and wage loss opinions be averaged. A 52 percent wage loss combined with a 36 percent task loss results in a 44 percent permanent partial general disability to the body as a whole.

The Board modifies the Award of the ALJ, finding that for the injuries suffered on March 10, 2001, claimant has suffered a 5 percent permanent partial general disability to the body as a whole on a functional level, followed by a 44 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 3, 2003, should be, and is hereby, modified, and the claimant, Mercedes Secena, is granted an award against the respondent, National Beef Packing Company, and its insurance carriers, for an injury occurring on March 10, 2001, with the specific insurance carrier on that date being identified as Commercial Union Insurance Company, a/k/a CGU Hawkeye Security, for a 5 percent permanent partial general disability on a functional basis, followed by a 44 percent permanent partial general disability to the body as a whole for the injuries suffered on March 10, 2001, utilizing the stipulated average weekly wage of $458.74.

Pursuant to the stipulation of the parties, claimant is awarded 10.92 weeks of temporary total disability compensation at the rate of $305.84 per week totaling $3,340.55, followed by 20.75 weeks of permanent partial general body disability compensation at the rate of $305.84 per week totaling $6,346.18 for a 5 percent impairment to the body as a whole on a functional basis. Thereafter, and beginning on January 4, 2002, claimant is

entitled to an additional 161.85 weeks of permanent partial general body disability compensation at the rate of $305.84 per week totaling $49,500.20 for a 44 percent permanent partial general disability, for a total award of $59,186.93.

As of May 26, 2004, claimant is entitled to 10.92 weeks of temporary total disability compensation at the rate of $305.84 per week totaling $3,340.55, followed by 134.69 weeks of permanent partial disability compensation at the rate of $305.84 per week totaling $41,193.59, for a total due and owing of $44,534.14 which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to an additional 47.91 weeks of permanent partial disability compensation at the rate of $305.84 per week totaling $14,652.79 until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier (Royal)
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier (CGU)
Terrence J. Malone, Attorney for Respondent and its Insurance Carrier (Liberty)
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director